



Department of Justice

STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

SEC. 701 (CHARITABLE CHOICE) OF
S. 304 DRUG ABUSE EDUCATION, PREVENTION, AND
TREATMENT ACT OF 2001

PRESENTED ON

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INTRODUCTION

By letter of May 24, 2001, the Senate Judiciary Committee invited the views of the U.S. Department of Justice concerning statutory and constitutional issues raised by § 701 (charitable choice) of S. 304, The Drug Abuse Education, Prevention, and Treatment Act of 2001. /Thank you for the invitation. This document is the Department's response to the Committee's letter.

Charitable choice is already part of three federal social service programs. The provision first appeared in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),¹ two years later it was incorporated into the Community Services Block Grant Act of 1998,² and last year it was made part of the reauthorization of funding for the Substance Abuse and Mental Health Services Administration (SAMHSA).³ Each of these programs has the overarching goal of helping those in poverty or treating those suffering from chemical dependency, and the programs seek to achieve their purpose by providing resources in the most effective and efficient means available. The object of charitable choice, then, is not to support or sponsor religion or the participating religious providers. Rather, the goal is secular, namely, to secure assistance for the

¹ 42 U.S.C. § 604a (Supp. 1996). Charitable choice appeared as § 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2161 (1996). Section 604a applies to two federal revenue streams: Temporary Assistance to Needy Families and Welfare to Work monies. Welfare to Work funds were made subject to PRWORA in the 1997 Balanced Budget Act.

² 42 U.S.C. § 9920 (Supp. 1998). Charitable choice appeared as § 679 of the Community Services Block Grant Act, which was Title II of the Coats' Human Services Reauthorization Act of 1998, Pub. L. No. 105-285, 112 Stat. 2702, 2749 (Oct. 27, 1998).

³ 42 U.S.C. § 300x-65 (Supp. 2000). SAMHSA concerns expenditures for substance abuse treatment and prevention under Titles V and XIX of the Public Health Services Act. The charitable choice provision pertaining to SAMHSA, signed by President Clinton on October 17, 2000, appeared as Title XXXIII, § 3305 of the Children's Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1212 (2000).

SAMHSA substance abuse treatment and prevention expenditures were again made subject to a charitable choice provision in the Community Renewal Tax Relief Act of 2000, signed by President Clinton on December 21, 2000. *See* 42 U.S.C. § 290kk (Supp. 2000). This Act was incorporated by reference in the Consolidated Appropriation Act of 2001, Pub. L. No. 106-554.

poor and individuals with needs, and to do so by leveling the playing field for providers of these services who are faith-based.

Charitable choice is often portrayed as a source of new federal financial assistance made available to—indeed earmarked for—religious charities. It is not. Rather, charitable choice is a set of grant rules altering the terms by which federal funds are disbursed under existing programs of aid. As such, charitable choice interweaves three fundamental principles, and each principle receives prominence in the legislation.

First, charitable choice imposes on both government and participating FBOs the duty to not abridge certain enumerated rights of the ultimate beneficiaries of these welfare programs. The statute rightly protects these individuals from religious discrimination by FBOs, as well as from compulsion to engage in sectarian practices against their will.

Second, the statute imposes on government the duty to not intrude into the institutional autonomy of faith-based providers. Charitable choice extends a guarantee to each participating faith-based organization [FBO] that, notwithstanding the receipt of federal grant monies, the organization “shall retain its independence from Federal, State, and local governments, including such organization’s control over the definition, development, practice, and expression of its religious beliefs.”⁴ In addition to this broadly worded safeguard, there are more focused prohibitions on specific types of governmental interference such as demands to strip religious symbols from the walls of FBOs and directives to remake the governing boards of these providers.⁵ A private right of

⁴ 42 U.S.C. § 604a(d)(1). The parallel subsection in S. 304 is § 701(b)(1).

⁵ 42 U.S.C. § 604a(d)(2). The parallel subsection in S. 304 is § 701(b)(2).

action gives ready means of enforcement to these protections of institutional autonomy.⁶

Third, the statute reinforces the government’s duty to not discriminate with respect to religion when determining the eligibility of private-sector providers to deliver social services.⁷ In the past, an organization’s “religiosity,” obviously a matter of degree not reducible to bright- lines, was said to disqualify providers found to be “pervasively sectarian.” That inquiry was always fraught with difficulties. Now, rather than probing into whether a service provider is thought to be “too religious” as opposed to “secular enough,” charitable choice focuses on the nature of the desired services and the means by which they are to be provided. Accordingly, the relevant question is no longer “Who are you?” but “What can you do?” So long as a provider is prepared to operate in line with all statutory and constitutional parameters, then an organization’s degree of “religiosity” is no longer relevant.

Because they are a useful way of framing the most pertinent statutory and constitutional questions, we expand on these three principles below. Moreover, as will be discussed, the Department of Justice recommends certain amendments to § 701 of S. 304.

I. The Rights of Beneficiaries

In programs subject to charitable choice, when funding goes directly to a social service provider the ultimate beneficiaries are empowered with a choice.⁸ Beneficiaries who want to

⁶ 42 U.S.C. § 604a(i). The parallel subsection in S. 304 is § 701(g).

⁷ 42 U.S.C. § 604a(b) and (c). The parallel subsection in S. 304 is § 701(a).

⁸ Charitable choice contemplates both direct and indirect forms of aid. 42 U.S.C. § 604a(a)(1). This is most apparent in S. 304 by comparing the subparts of § 701(e). If the means of funding is indirect, as with, for example, federal child-care certificates, then choice is intrinsic to the beneficiary’s selection of a child care center at which to “spend” his or her certificate.

receive services from an FBO may do so, assuming, of course, that at least one FBO has received funding.⁹ On the other hand, if a beneficiary has a religious objection to receiving services at an FBO, then the government is required to provide an equivalent alternative.¹⁰ This is the “choice” in charitable choice. Moreover, some beneficiaries, for any number of reasons, will inevitably think their needs better met by an FBO. This possibility of choosing to receive their services at an FBO is as important a matter as is the right not to be assigned to a religious provider. There is much concern voiced by civil libertarians about the latter choice, whereas the former is often overlooked. Supporters of charitable choice regard both of these choices—to avoid an FBO or to seek one out—as important.

If a beneficiary selects an FBO, the provider cannot discriminate against the beneficiary on account of religion or a religious belief.¹¹ Moreover, the text’s explicit protection of “a refusal to actively participate in a religious practice” insures a beneficiary’s right to avoid any unwanted sectarian practices.¹² Hence, participation, if any, is voluntary or noncompulsory. When direct

⁹ It may be that on some occasions no FBOs successfully compete for a grant or cooperative agreement. This is to be expected. Charitable choice is not a guarantee that resources will flow to FBOs. Rather, charitable choice guarantees only that FBOs will not be discriminated against with respect to religion.

¹⁰ 42 U.S.C. § 604a(e)(1). The parallel subsection in S. 304 is § 701(d)(1). The alternative may be another provider not objectionable to the beneficiary, or the government may find it more cost efficient to purchase the needed services on the open market.

¹¹ 42 U.S.C. § 604a(g) (FBOs may not discriminate against beneficiaries “on the basis of religion [or] a religious belief”). The parallel subsection in S. 304 is § 701(e)(1).

¹² 42 U.S.C. § 604a(g) (FBOs may not discriminate or otherwise turn away a beneficiary from the organization’s program because the beneficiary “refus[es] to actively participate in a religious practice”). Thus, a beneficiary cannot be forced into participating in sectarian activity. Moreover, by virtue of § 604a(j), any such sectarian practices must be privately funded in their entirety and, hence, conducted separate from the government-funded program. *See* Part III, below, discussing the need to separate sectarian practices from the government-funded program.

funding is involved, one recent court decision suggested that this “opt-out” right is required by the first amendment.¹³ Beneficiaries are required to be informed of their rights.¹⁴

The Department of Justice recommends that § 701 of S. 304 be strengthened by amending subsection (h) along the lines indicated in the note below.¹⁵ This proposal has a clearer statement of the voluntariness requirement. The provision on separating the government-funded program from sectarian practices is discussed in Part III, below. The suggested Certificate of Compliance has the purpose of impressing upon both the government/grantor and the FBO the importance of both voluntariness and the need to separate sectarian practices.

II. The Autonomy of Faith-Based Providers

Care must be taken that government funding not cause the religious autonomy of FBOs to be undermined. Likewise, care must be taken that the availability of government funding not

¹³ See *DeStefano v. Emergency Housing Group, Inc.*, 2001 WL 399241 * 10-12 (2d Cir. Apr. 20, 2001) (dictum expressing belief that it would be violative of Establishment Clause should beneficiaries of state-funded alcohol treatment program be compelled to attend Alcoholics Anonymous sessions, such sessions being deemed religious indoctrination).

¹⁴ The “actual notice” requirement first appeared in the SAMHSA reauthorization. See 42 U.S.C. § 300x-65(e)(2). The parallel subsection in S. 304 is § 701(d)(2). Of course, nothing in prior versions of charitable choice prevents the government/grantor from ensuring actual notice of rights to beneficiaries. Moreover, while it may be prudent for the grantor to provide notice of rights whether required by the underlying legislation or not, the absence of a requirement in older versions of the law hardly rises to the level of a constitutional concern.

¹⁵ (h) LIMITATIONS ON USE OF FUNDS ~~FOR CERTAIN PURPOSES~~; **VOLUNTARINESS**.— No funds provided through a grant or **cooperative agreement** ~~contract~~ to a religious organization to provide assistance ~~pursuant to~~ **under** any program **funded under this Act** ~~described in subsection (a)~~ shall be expended for sectarian **instruction**, worship, ~~instruction~~, or proselytization. **If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under this Act. A certificate shall be separately signed by religious organizations, and filed with the government agency that disbursed the funds, certifying that the organization is aware of and will comply with this subsection. Failure to comply with the terms of the certification may, in addition to other sanctions as provided by law, result in the withholding of the funds and the suspension or termination of the agreement.**

cause FBOs to fall under the sway of government or silence their prophetic voice. Accordingly, charitable choice was drafted to vigorously safeguard the “religious character” of FBOs, explicitly reserving to these organizations “control over the definition, development, practice, and expression” of religious belief.¹⁶ Additionally, congressional protection for the institutional autonomy of FBOs was secured so as to leave them free to succeed at what they do well, namely reaching under-served communities. Finally, protecting institutional autonomy was thought necessary to draw reluctant FBOs into participating in government programs, something many FBOs are unlikely to do if they face invasive or compromising controls.

One of the most important guarantees of institutional autonomy is an FBO’s ability to select its own staff in a manner that takes into account its faith. Many FBOs believe that they cannot maintain their religious vision over a sustained time period without the ability to replenish their staff with individuals who share the tenets and doctrines of the association. The guarantee is central to each organization’s freedom to define its own mission according to the dictates of its faith. It was for this reason that Congress wrote an exemption from religious discrimination by religious employers into Title VII of the Civil Rights Act of 1964. And charitable choice specifically provides that FBOs retain this limited exemption from federal employment nondiscrimination laws.¹⁷ While it is essential that FBOs be permitted to make employment

¹⁶ Religious organizations often serve a useful role as moral critics of culture and, in particular, the actions of government. The mention of “control over . . . expression” in 42 U.S.C. § 604a(d)(1), prohibits government from using the threat of denial of a grant, or withholding monies due under an existing grant, as a means of “chilling” the prophetic voice of the FBO.

¹⁷ 42 U.S.C. § 604a(f). The parallel subsection in S. 304 is § 701(c). In order that these employment protections be more clear to all concerned, while still achieving the intended purpose, the Department of Justice recommends that the “Employment Practices” subsection to § 701 be amended as set out below:

(c) EMPLOYMENT PRACTICES.—

(1) IN GENERAL.—In order to aid in the preservation of its religious character and autonomy, a

decisions based on religious considerations, FBOs must, along with secular providers, follow federal civil rights laws prohibiting discrimination on the bases of race, color, national origin, gender, age, and disability.¹⁸

Opponents of charitable choice have charged that it permits a form of “government-funded job discrimination.” We do not believe this is the case for the following reasons. *First*, there is a certain illogic to the claim that charitable choice is “funding job discrimination.” The purpose of charitable choice, and the underlying federal programs, is not the creation or funding of jobs. Rather, the purpose is to fund social services. The FBO’s employment decisions are wholly private. Because the government is not involved with an FBO’s internal staffing decisions, there

religious organization that provides assistance under a program funded under this Act may, notwithstanding any other federal law pertaining to religious discrimination in employment, take into account the religion of the members of the organization when hiring, promoting, transferring, or discharging an employee.

(2) TITLE VII.—The exemption of a religious organization provided under section 702(a), and the exemption of an educational institution under section 703(e)(2) of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e–1(a), 2000e–2(e)(2)), regarding employment practices shall not be affected by the religious organization’s or institution’s provision of assistance under, or receipt of funds from, pursuant to a program funded under this Act described in subsection (b). Nothing in this section alters the duty of a religious organization to otherwise comply with the nondiscrimination provisions in title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

This proposed amendment would ensure that FBOs may continue to staff on a religious basis. However, in this proposal religious considerations may not affect the terms of the compensation package. Hence, there is no intended “religious override” of minimum wage laws, or matters like social security or unemployment compensation. Additionally, under this proposal any employment nondiscrimination provisions imbedded in the underlying federal program legislation cannot affect an FBO’s right to staff on a religious basis. Finally, the §§ 702(a), 703(e)(2) exceptions in Title VII, while not broadened in any respect, are expressly preserved.

¹⁸ In addition to Title VII of the Civil Rights Act of 1964, *see, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1994) (prohibiting discrimination on the bases of race, color, and national origin); Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994) (prohibiting discrimination in educational programs and activities on the bases of sex and visual impairment); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (prohibiting discrimination against otherwise qualified disabled individuals, including individuals with a contagious disease or an infection such as HIV); The Age Discrimination Act of 1975, 29 U.S.C. § 706(8)(c) (1994) (prohibiting discrimination on the basis of age).

is no causal link between the government's singular and very public act of funding and an FBO's numerous and very private acts related to its staffing. Importantly, these internal employment decisions are manifestly not "state or governmental action" for purposes of the Fifth and Fourteenth Amendments.¹⁹ Hence, because the Constitution restrains only "governmental action," these private acts of religious staffing cannot be said to run afoul of constitutional norms.²⁰

Second, critics of charitable choice are wrong when they claim to have detected a contradiction. Why, they ask, is it important to staff on a religious basis when the FBOs cannot engage in religious indoctrination within a government-funded program? Since there can be no such indoctrination, they go on, what possible difference could it make that employees share the FBO's faith? There is no contradiction, however, once this line of argumentation is seen as failing to account for the FBO's perspective. From the government's perspective, to feed the hungry or house the destitute is secular work. But from the perspective of the FBO, to operate a soup kitchen or open a shelter for the homeless are acts of mercy and thus spiritual service. In his concurring opinion in *Corporation of the Presiding Bishop v. Amos*, Justice William Brennan, remembered

¹⁹ See *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding that pervasive regulation and the receipt of government funding at a private nursing home does not, without more, constitute state action); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that a private school heavily funded by the state is not thereby state actor); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (holding that the enactment of a law whereby the state acquiesces in the private acts of a commercial warehouse does not thereby convert the acts of the warehouse into those of the state).

²⁰ That an act of religious staffing is not attributable to the government and thus not subject to Establishment Clause norms restraining actions by government has already been ruled on by the Supreme Court. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. . . . [I]t must be fair to say that the *government itself* has advanced religion through its own activities and influence."); *id.* at 337 n.15 ("Undoubtedly, [the employee's] freedom of choice in religious matters was impinged upon, but it was the Church ... and not the Government, who put him to the choice of changing his religious practices or losing his job.").

as one of the Court’s foremost civil libertarians, saw this immediately when he wrote that what government characterizes as social services, religious organizations view as the fulfillment of religious duty, as service in grateful response to unmerited favor, as good works that give definition and focus to the community of faithful, or as a visible witness and example to the larger society.²¹ All of which is to observe that even when not engaged in “religious indoctrination” such as proselytizing or worship, FBOs view what they are doing as religiously motivated and thus may desire that such acts of mercy and love be performed by those of like-minded creed.²²

Third, it is not always appreciated that private acts of religious staffing are not motivated by prejudice or malice. In no way is religious staffing by FBOs comparable to the invidious stereotyping, even outright malice, widely associated with racial and ethnic discrimination. Rather, the FBO is acting—and understandably so—in accord with the dictates of its sincerely held religious convictions. Justice William Brennan, once again, was quick to recognize the importance of such civil rights exemptions to the autonomy of faith-based organizations:

Determining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church’s ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.²³

²¹ 483 U.S. at 342-44 (Brennan, J., concurring).

²² We acknowledge that many FBOs do not staff on a religious basis, nor do they desire to do so. But many others do, and desire to continue doing so. Further, many FBOs that staff on a religious basis do so with respect to some jobs but not others. Finally, many FBOs do not staff on the basis of religion in any affirmative sense, but they do require that employees not be in open defiance of the organization’s creed. The employment practices of FBOs, as well as their religious motives, are varied and complex, yet another reason for government to eschew attempts to regulate the subject matter.

²³ 483 U.S. at 342-43 (Brennan, J., concurring).

Which is to say, not all discrimination is malevolent.²⁴ A religious organization favoring the employment of those of like-minded faith is comparable to an environmental organization staffing only with employees devoted to preserving the environment, a feminist organization hiring only those devoted to the cause of expanded opportunities for women, or a teacher's union hiring only those opposed to school vouchers. To bar a religious organization from hiring on a religious basis is to assail the very animating cause for which the organization was formed in the first place. If these FBOs cannot operate in accord with their own sense of self-understanding and mission, then many will decline to compete for charitable choice funding. If that happens, the loss will be borne most acutely by the poor and needy.

Fourth, in a very real sense Congress already made a decision to protect religious staffing by FBOs back in 1964, and then to expand on its scope in 1972.²⁵ Section 702(a) of Title VII of the Civil Rights Act of 1964²⁶ exempts religious organizations from Title VII liability for employment decisions based on religion.²⁷ Opponents claim that the § 702(a) exemption is waived

²⁴ Cf. op-ed column by Nathan J. Diamant, *A Slander Against Our Sacred Institutions*, WASHINGTON POST p. A23 (May 28, 2001) ("Their assumption is that faith-based hiring by institutions of faith is equal in nature to every other despicable act of discrimination in all other contexts. This is simply not true.").

²⁵ The nature and history of this expansion in the Equal Employment Opportunity Act of 1972 is set forth in *Amos*, 483 U.S. at 332-33. A co-sponsor of the 1972 expansion, Senator Sam Ervin, explained its purpose in terms of reinforcing the separation of church and state. The aim, said Senator Ervin, was to "take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972).

²⁶ 42 U.S.C. § 2000e-1(a) (1994). Religious educational institutions are separately exempt under 42 U.S.C. § 2000e-2(e)(2) (1994).

²⁷ The Title VII religious exemption was upheld in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). *Amos* held that the exemption was not a religious preference violative of the Establishment Clause. Moreover, the Establishment Clause permits Congress to enact exemptions from regulatory burdens not compelled by the Free Exercise Clause, as well as regulatory exemptions that accommodate only religious practices and organizations. *Id.* at 334, 338.

when an FBO becomes a federally funded provider of social services. The law is to the contrary. Waiver of rights is disfavored in the law, and, as would be expected, the case law holds that the § 702(a) exemption is not forfeited when an FBO becomes a provider of publicly funded services.²⁸ Indeed, charitable choice expressly states that the § 702(a) exemption is preserved.²⁹ In light of the fact that the statutory language makes clear to FBOs that they will not be “impair[ed]” in their “religious character” if they participate in charitable choice, it is wholly contradictory to then suggest that FBOs have impliedly waived this valuable autonomy right.

Charitable choice affirmatively enables and requires government to stop “picking and choosing” between groups on the basis of religion. No longer can there be wholesale elimination of able and willing providers found by regulators or civil magistrates to be “too religious,” a constitutionally intrusive and analytically problematic determination.³⁰ With charitable choice,

²⁸ See *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); *Siegel v. Truett-McConnell College*, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1994), *aff’d*, 73 F.3d 1108 (11th Cir. 1995) (table) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption or violate the Establishment Clause); *Young v. Shawnee Mission Medical Center*, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received federal Medicare payments); see *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (exemption to Title VII for religious staffing by a religious organization is not waivable); *Arriaga v. Loma Linda University*, 10 Cal.App.4th 1556, 13 Cal. Rptr.2d 619 (1992) (religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding); *Saucier v. Employment Security Dept.*, 954 P.2d 285 (Wash. Ct. App. 1998) (Salvation Army’s religious exemption from state unemployment compensation tax does not violate Establishment Clause merely because the job of a former employee in question, a drug abuse counselor, was funded by federal and state grants).

²⁹ 42 U.S.C. § 604a(f). The parallel subdivision in S. 304 is § 701(c).

³⁰ In regard to the constitutional and practical difficulties with sorting out, and then barring from program participation, those FBOs thought to fit that slippery category of “pervasively sectarian,” the plurality in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), said as follows:

[T]he inquiry into the recipient’s religious views required by a focus on whether a school is

religion is irrelevant during the grant awarding process. Nor does the government, in making awards, need to sort out those groups thought “genuinely” religious from those deemed *pseudo*-religious. This means that, contrary to the critics’ fears, charitable choice leads to less, rather than more, regulation of religion.

Additionally, welfare beneficiaries have greater choice when selecting their service provider. For those beneficiaries who, out of spiritual interests or otherwise, believe they will be better served by an FBO, such choices will now be available in greater number. Expanding the variety of choices available to needy individuals in turn reduces the government’s influence over how those individual choices are made.

III. THE NEUTRALITY PRINCIPLE

When discussing Establishment Clause restraints on a government’s program of aid, a rule of equal-treatment or nondiscrimination among providers, be they secular or religious, is termed “neutrality” or the “neutrality principle.” Charitable choice is consistent with neutrality, but courts need not wholly embrace the neutrality principle to sustain the constitutionality of charitable choice.

The U.S. Supreme Court distinguishes, as a threshold matter, between direct and indirect

pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs. . . . Although the dissent welcomes such probing . . . we find it profoundly troubling.

Id. at 2551 (citations omitted).

The problem is more thoroughly addressed at Vol. 42 WM & MARY L. REV. 883, 907-14 (2001) (collecting cases suggesting that to require distinguishing between pervasively and non-pervasively sectarian organizations is inconsistent with the Court’s case law elsewhere holding that civil authorities should refrain from probing the inner workings of religious organizations).

aid.³¹ For any given program, charitable choice allows, at the government's option, for direct or indirect forms of funding, or both. Indirect aid is where the ultimate beneficiary is given a coupon, or other means of free agency, such that he or she has the power to select from among qualified providers at which the coupon may be "redeemed" and the services rendered. In a series of cases, and in more recent commentary contrasting indirect aid with direct-aid cases, the Supreme Court has consistently upheld the constitutionality of mechanisms providing for indirect means of aid distributed without regard to religion.³² The Child Care and Development Block Grant Program of 1990,³³ for example, has been providing low income parents indirect aid for child care via "certificates" redeemable at, *inter alia*, churches and other FBOs. The act has never been so much as even challenged in the courts as unconstitutional.

In the context of direct aid, the Supreme Court decision that has most recently addressed the neutrality principle is *Mitchell v. Helms*.³⁴ The four-Justice plurality, written by Justice Thomas, and joined by the Chief Justice, and Justices Scalia and Kennedy, embraced, without reservation, the neutrality principle. In the sense of positive law, however, Justice O'Connor's

³¹ See *Mitchell v. Helms*, 120 S. Ct. 2530, 2558-59 (2000) (O'Connor, J., concurring in the judgment).

³² See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (providing special education services to Catholic high school student not prohibited by Establishment Clause); *Witters v. Washington Dept. of Servs. For the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation grant to disabled student that elected to use the grant to obtain training as a youth pastor); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state income tax deduction for parents paying school tuition at religious schools); see also *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 878-79 (1995) (Souter, J., dissenting) (distinguishing cases upholding indirect funding to individuals, admitted to be the law of the Court, from direct funding to religious organizations).

³³ 42 U.S.C. §§ 9858 - 9858q (1994).

³⁴ 120 S. Ct. 2530 (2000) (plurality opinion).

opinion concurring in the judgment is controlling in the lower courts and on legislative bodies.³⁵

Before proceeding in greater detail, the controlling principle coming from *Mitchell v. Helms* can be briefly stated: *A government program of aid that directly assists the delivery of social services at a faith-based provider, one selected by the government without regard to religion, is constitutional, but real and meaningful controls must be built into the program so that the aid is not diverted and spent on religious indoctrination.*³⁶

Based on Justice O'Connor's opinion, when combined with the four Justices comprising the plurality, it can be said that: (1) neutral, indirect aid to a religious organization does not violate the Establishment Clause;³⁷ and (2) neutral, direct aid to a religious organization does not, without more, violate the Establishment Clause.³⁸ Having indicated that program neutrality is an important but not sufficient factor in determining the constitutionality of direct aid, Justice O'Connor went on to say that: (a) *Meek v. Pittenger*³⁹ and *Wolman v. Walter*⁴⁰ should be overruled; (b) the Court

³⁵ *Id.* at 2556 (O'Connor, J., concurring in the judgment). Her opinion was joined by Justice Breyer. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in judgment on narrowest grounds is controlling).

³⁶ *Mitchell* does not speak—except in the most general way—to the scope of the Establishment Clause when it comes to other issues such as religious exemptions in regulatory or tax laws, religious symbols on public property, or religious expression by government officials. In that regard, *Mitchell* continues the splintering of legal doctrine leading to different Establishment Clause tests for different contexts.

³⁷ *Id.* at 2558-59.

³⁸ *Id.* at 2557. Justice O'Connor explained that by "neutral" program of aid she meant "whether the aid program defines its recipients by reference to religion." *Id.* at 2560. To be "neutral" in this sense, a grant program must be facially nondiscriminatory with respect to religion, and, where there is discretion in awarding a grant, nondiscriminatory as applied.

³⁹ *Id.* at 2556, 2563-66. *Meek v. Pittenger*, 421 U.S. 349 (1975) (plurality in part), had struck down loans to religious schools of maps, photos, films, projectors, recorders, and lab equipment, as well as disallowed services for counseling, remedial and accelerated teaching, and psychological, speech, and hearing therapy.

⁴⁰ 120 S. Ct. at 2556, 2563-66. *Wolman v. Walter*, 433 U.S. 229 (1977) (plurality in part), had struck down use of public school personnel to provide guidance, remedial and therapeutic speech and hearing services

should do away with all presumptions of unconstitutionality; (c) proof of actual diversion of government aid to religious indoctrination would be violative of the Establishment Clause; and (d) while adequate safeguards to prevent diversion are called for, an intrusive and pervasive governmental monitoring of FBOs is not required.

The federal program in *Mitchell* entailed aid to K-12 schools, public and private, secular and religious, allocated on a per-student basis. The same principles apply, presumably, to social service and health care programs, albeit, historically the Court has scrutinized far more closely direct aid to K-12 schools compared to social welfare and health care programs.⁴¹

In cases involving programs of direct aid to K-12 schools, Justice O'Connor started by announcing that she will follow the analysis first used in *Agostini v. Felton*.⁴² She began with the two-prong *Lemon* test as modified in *Agostini*: is there a secular purpose and is the primary effect to advance religion? Plaintiffs did not contend that the program failed to have a secular purpose,

away from the religious school campus, disallowed the loan of instructional materials to religious schools, and disallowed transportation for field trips by religious school students.

⁴¹ See *Bowen v. Kendrick*, 487 U.S. 589 (1989) (upholding, on its face, religiously neutral funding of teenage sexuality counseling centers); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding use of federal funds for construction at a religious hospital). In sharp contrast, the Court has been “particularly vigilant” in monitoring compliance with the Establishment Clause in K-12 schools, where the government exerts “great authority and coercive power” over students through a mandatory attendance requirements. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

⁴² *Mitchell*, 120 S. Ct. at 2556, 2560. *Agostini v. Felton*, 521 U.S. 203 (1997), upheld a program whereby public school teachers go into K-12 schools, including religious schools, to deliver remedial educational services.

thus she moved on to the second part of the *Lemon/Agostini* test.⁴³ Drawing on *Agostini*, Justice O'Connor noted that the primary-effect prong is guided by three criteria. The first two inquiries are whether the government aid is actually diverted to the indoctrination of religion and whether the program of aid is neutral with respect to religion. The third criterion is whether the program creates excessive administrative entanglement,⁴⁴ now clearly downgraded to just one more factor to weigh under the primary-effect prong.⁴⁵

After outlining for the reader the Court's *Lemon/Agostini* approach, Justice O'Connor then inquired into whether the aid was actually diverted, in a manner attributable to the government, and whether program eligibility was religion neutral. Because the federal K-12 educational program under review in *Mitchell* was facially neutral, and administered evenhandedly, as to religion,⁴⁶ she spent most of her analysis on the remaining factor, namely, diversion of grant

⁴³ *Mitchell*, 120 S. Ct. at 2560. Plaintiffs were well counseled not to argue that the program lacked a secular purpose. The secular-purpose prong of the test is easily satisfied. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) ("a court may invalidate a statute only if it is motivated wholly by an impermissible purpose").

⁴⁴ In *Mitchell*, plaintiffs did not contend that the program created excessive administrative entanglement. 120 S. Ct. at 2560. Prior to *Agostini*, entanglement analysis was a separate, third prong to the *Lemon* test.

The Supreme Court has long since stop using "political divisiveness" inquiry as a separate aspect of entanglement analysis. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 617 n.14 (1988) (rejecting political divisiveness alone as a basis for invalidating governmental aid program). Hence, neither the plurality nor Justice O'Connor gave even passing mention to "political divisiveness." We follow their lead.

⁴⁵ Alternatively, the same evidence shifted under the effect prong of *Lemon/Agostini* can be examined pursuant to Justice O'Connor's no-endorsement test. *Mitchell*, 120 S. Ct. at 2560. The no-endorsement test asks whether an "objective observer" would feel civic alienation upon examining the program of aid and learning that some of the grants are awarded to FBOs. A finding of government endorsement of religion is unlikely unless a facially neutral program, when applied, singles out religion for favoritism. In *Mitchell*, Justice O'Connor did not utilize the alternative no-endorsement test when doing the *Lemon/Agostini* analysis. We follow her lead. She did, however, use the no-endorsement test for another purpose. *See id.* at 2559 (explaining why she thought the plurality was wrong to abandon the direct-aid/indirect-aid distinction).

⁴⁶ Religious neutrality, explained Justice O'Connor, ensures that an aid program does not provide a financial incentive for the individuals intended to ultimately benefit from the aid "to undertake religious

assistance to religious indoctrination. Justice O'Connor noted that the educational aid in question was, by the terms of the statute, required to supplement rather than to supplant monies received from other sources,⁴⁷ that the nature of the aid was such that it could not reach the "coffers" of places for religious inculcation, and that the use of the aid was statutorily restricted to "secular, neutral, and nonideological" purposes.⁴⁸ Concerning the form of the assistance, she noted that the aid consisted of educational materials and equipment rather than cash, and that the materials were on loan to the religious schools.⁴⁹

indoctrination." *Mitchell*, 120 S. Ct. at 2561 (quoting *Agostini*).

⁴⁷ One of the aims of charitable choice is that faith-based and other community organizations be able to expand their capacity to provided for the social service needs of under-served neighborhoods. In that sense, then, charitable choice is supplemental. For many neutral programs of aid, application of the supplement/not-supplant factor would, if allowed to be controlling, conflict with long-settled precedent. For example, the Court has long since allowed state-provided textbooks and bussing for religious schools. *See Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (textbooks); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bussing). Once the government provided textbooks and bussing, monies in a school's budget could be shifted to other uses, including to sectarian uses. Yet such aid is in apparent conflict with the admonition to supplement/not-supplant. *See also* *Committee for Public Education v. Regan*, 444 U.S. 646, 661-62 (1980), where the Court upheld aid that "supplanted" expenses otherwise borne by religious schools for state-required testing. Even the dissent in *Mitchell* concedes that reconciliation between *Regan* and an absolute prohibition on aid that supplants rather than supplements "is not easily explained." 120 S. Ct. at 2588 n.17 (Souter, J., dissenting). *Regan* suggests that no "blanket rule" exists. *Id.* at 2544 n.7 (plurality).

The Supreme Court's past practice is to trace the government funds to the point of expenditure, rejecting any requirement whereby government funds must not be provided where the public funds thereby "free up" private money which then might be diverted to religious indoctrination. *See Regan*, 444 U.S. at 658 ("The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."); *New York v. Cathedral Academy*, 434 U.S. 125, 134 (1977) ("this Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aide to religious institutions").

⁴⁸ 120 S. Ct. at 2557, 2562.

⁴⁹ *Id.* at 2562. On at least one occasion the Supreme Court upheld direct cash payments to religious K-12 schools. *See Committee for Public Education v. Regan*, 444 U.S. 646 (1980). The payments were in reimbursement for state-required testing. Rejecting a rule that cash was never permitted, the *Regan* Court explained:

We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve [direct] payments in cash.

Justice O'Connor proceeded to reject a rule of unconstitutionality where the character of the aid is merely capable of diversion to religious indoctrination, hence overruling *Meek* and *Wolman*.⁵⁰ As the Court did in *Agostini*, Justice O'Connor rejected employing presumptions of unconstitutionality and indicated that henceforth she will require proof that the government aid was actually diverted to indoctrination.⁵¹ Because the "pervasively sectarian" test is such a presumption, indeed, an irrebutable presumption (i.e., any direct aid to a highly religious organization is deemed to advance sectarian objectives),⁵² Justice O'Connor is best understood to have rendered the "pervasively sectarian" test no longer relevant when assessing neutral programs

Id. at 658. See also *Mitchell*, 120 S. Ct. at 2546 n.8 (plurality noting that monetary assistance is not "*per se* bad," just a factor calling for more care).

Justice O'Connor explained that monetary aid is of concern because it "falls precariously close to the original object of the Establishment Clause prohibition." *Mitchell*, 120 S. Ct. at 2566. Part of that history, explicated in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), was the defeat spearheaded in Virginia by James Madison of a proposed tax. As more precisely explained by Justice Thomas, the legislation defeated in Virginia was a tax ear-marked for the support of clergy. *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 852 (1995) (Thomas, J., concurring). Opposition to a tax ear-marked for explicitly religious purposes indeed does go to the heart of the adoption of the Establishment Clause. Charitable choice monies, however, come from general tax revenues, are awarded in a manner that is neutral as to religion, and do not fund sectarian practices.

⁵⁰ 120 S. Ct at 2561-68.

⁵¹ Justice O'Connor's statement sidelining future reliance on presumptions that employees of highly religious organizations cannot or will not follow legal restraints on the expenditure of government funds is as follows:

I believe that our definitive rejection of [the] presumption [in *Agostini*] also stood for—or at least strongly pointed to—the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.

Id. at 2567.

⁵² See *id.* at 2561 (noting that *Agostini* rejected a presumption drawn from *Meek* and later *Aguilar*); *id.* at 2563-64 (quoting from *Meek* the "pervasively sectarian" rationale and noting it created an irrebutable presumption which Justice O'Connor later rejects); *id.* at 2567 (requiring proof of actual diversion, thus rendering "pervasively sectarian" test irrelevant); *id.* at 2568 (rejecting presumption that teachers employed by religious schools cannot follow statutory requirement that aid be use only for secular purposes); and *id.* at 2570 (rejecting presumption of bad faith on the part of religious school officials).

of aid.⁵³

Justice O'Connor requires that no government funds be diverted to "religious indoctrination," thus religious organizations receiving direct funding will have to separate their social service program from their sectarian practices.⁵⁴ If the federal assistance is utilized for educational functions without attendant sectarian activities, then there is no problem. If the aid flows into the entirety of an educational program and some "religious indoctrination [is] taking place therein," then the indoctrination "would be directly attributable to the government."⁵⁵ Hence, if any part of an FBO's activities involve "religious indoctrination," such activities must be set apart from the government-funded program and, hence, are privately funded.

A welfare-to-work program operated by a church in Philadelphia illustrates how this can be done successfully. Teachers in the program conduct readiness-to-work classes in the church basement weekdays pursuant to a government grant. During an hour break for free-time the pastor of the church holds a voluntary Bible study in her office up on the ground floor. The sectarian

⁵³ While Justice O'Connor did not join in the plurality's denunciation of the "pervasively sectarian" doctrine as bigoted, her opinion made plain that the doctrine has lost relevance. Thus, while not taking issue with the plurality's condemnation of the doctrine as anti-Catholic, she in fact explicitly joined in overruling the specific portions of *Meek* that set forth the operative core of the "pervasively sectarian" concept. 120 S. Ct. at 2563.

⁵⁴ *Id.* at 2568.

⁵⁵ *Id.* A lower court recently applied this principle by striking down direct monetary payments, unrestricted as to use, to reimburse schools, including religious schools, to reimburse them for the cost of Internet access. *See Freedom From Religion Foundation v. Bugher*, 2001 WL 476595 (7th Cir. Apr. 27, 2001). Once received, the money went into general revenues and could later be used for sectarian purposes. On the other hand, the lower trial court decision in the same case upheld a parallel program whereby the state provided a below-cost Internet link to schools, including religious schools. Hence, the aid could not be diverted to sectarian use. 55 F. Supp.2d 962 (W.D. Wis. 1999). While on appeal, the plaintiffs' challenge to this parallel program was dropped when, in the interim, *Mitchell v. Helms* was handed down.

instruction is privately funded and separated in both time and location from the welfare to work classes.

In the final part of her opinion, Justice O'Connor explained why safeguards in the federal educational program at issue in *Mitchell* reassured her that the program, as applied, was not violative of the Establishment Clause. A neutral program of aid need not be failsafe, nor does every program require pervasive monitoring.⁵⁶ The statute limited aid to “secular, neutral, and nonideological” assistance and expressly prohibited use of the aid for “religious worship or instruction.”⁵⁷ State educational authorities required religious schools to sign Assurances of Compliance with the above-quoted spending prohibitions being express terms in the grant agreement.⁵⁸ The state conducted monitoring visits, albeit infrequently, and did a random review of government-purchased library books for their sectarian content.⁵⁹ There was also monitoring of religious schools by local public school districts, including a review of project proposals submitted by the religious schools and annual program-review visits to each recipient school.⁶⁰ The monitoring did catch instances of actual diversion, albeit not a substantial number, and Justice O'Connor was encouraged that when problems were detected they were timely corrected.⁶¹

Justice O'Connor said that various diversion-prevention factors such as supplement/not-

⁵⁶ 120 S. Ct. at 2569.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2569-70.

⁶¹ *Id.* at 2571-72.

supplant, aid not reaching religious coffers, and the aid being in-kind rather than monetary are not talismanic. She made a point not to elevate them to the level of constitutional requirements.⁶² Rather, effectiveness of these diversion-prevention factors, and other devices doing this preventative task, are to be sifted and weighed given the overall context of, and experience with, the government's program.⁶³

Charitable choice is responsive to the *Lemon/Agostini* test and Justice O'Connor's opinion in *Mitchell v. Helms*:

1. The legislation gives rise to neutral programs of aid and expressly prohibits diversion of the aid to "sectarian worship, instruction, or proselytization." Thus, sectarian aspects of an FBO's activities would have to be segmented off and, if continued, privately funded. An amendment recommended by the Department of Justice is set out in the note below.⁶⁴ Under this proposal, direct monetary funding is allowed where an FBO, by structure and operation, will not permit

⁶² *Id.* at 2572 ("[r]egardless of whether these factors are constitutional requirements . . .").

⁶³ Monetary payments are just a factor to consider, not controlling. This makes sense given Justice O'Connor's concurring opinion in *Bowen v. Kendrick*, wherein she joined in approving cash grants to religious organizations, even in the particularly "sensitive" area of teenage sexual behavior, as long as there is no actual "use of public funds to promote religious doctrines." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). *See also supra* note 49.

⁶⁴ The Department of Justice recommends that S. 304 be clarified by the following amendment:

(h) LIMITATIONS ON USE OF FUNDS; ~~VOLUNTARINESS FOR CERTAIN PURPOSES~~.- No funds provided through a grant or ~~cooperative agreement contract~~ to a religious organization to provide assistance ~~pursuant to under~~ any program ~~funded under this Act described in subsection (a)~~ shall be expended for sectarian ~~instruction~~, worship, ~~instruction~~, or proselytization. ~~If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under this Act. A certificate shall be separately signed by religious organizations, and filed with the government agency that disbursed the funds, certifying that the organization is aware of and will comply with this subsection. Failure to comply with the terms of the certification may, in addition to other sanctions as provided by law, result in the withholding of the funds and the suspension or termination of the agreement.~~

diversion of government funds to religious indoctrination.⁶⁵ Some FBOs, of course, will be unable or unwilling to separate their program in the required fashion. Charitable choice is not for such providers. Those FBOs who do not qualify for direct funding should be considered candidates for indirect means of aid.

2. Participation by beneficiaries is voluntary or noncompulsory. A beneficiary assigned to an FBO has a right to demand an alternative provider. Having elected to receive services at an FBO, a beneficiary has the additional right to “refuse to participate in a religious practice.” *See* discussion in Part I, above.

3. Government-source funds are kept in accounts separate from an FBO’s private-source funds, and the government may audit, at any time, those accounts that receive government funds.⁶⁶ Thus, charitable choice does take special care, because the aid is in the form of monetary grants, in two ways: separate accounts for government funds are established, hence, preventing the diversion of “cash to church coffers;”⁶⁷ and direct monetary grants are restricted to program services, hence, must not be diverted to sectarian practices.⁶⁸

⁶⁵ Justice O’Connor nowhere defined what she meant by “religious indoctrination.” However, elsewhere the Supreme Court has found that prayer, devotional Bible reading, veneration of the Ten Commandments, classes in confessional religion, and the biblical creation story taught as science are all inherently religious. 42 WM & MARY, *supra* note 30, at 915 (collecting cases).

⁶⁶ In the Substance Abuse and Mental Health Services Administration reauthorization the segregation of accounts is required. 42 U.S.C. § 300x-65(g)(2). This improves accountability, especially in helping to avoid diversion to “religious coffers,” with little loss of organizational autonomy. The parallel subsection in S. 304 is § 701(f)(2).

⁶⁷ *See* 42 U.S.C. 300x-65(g)(1).

⁶⁸ *See* 42 U.S.C. 300x-65(i).

4. For larger grantees, the government requires regular audits by a certified public accountant. The results are to be submitted to the government, along with a plan of correction if any variances that are uncovered.⁶⁹

Nothing in charitable choice prevents officials from implementing reasonable and prudent procurement regulations, such as requiring providers to sign a Certification of Compliance promising attention to essential statutory duties.⁷⁰ Additionally, it is not uncommon for program policies to require of providers periodic compliance self-audits. Any discrepancies uncovered in a self-audit must be promptly reported to the government along with a plan to timely correct any deficiencies.⁷¹ The Department of Justice believes it prudent to add these additional provisions to § 701 of S. 304.

CONCLUSION

Charitable choice facially satisfies the constitutional parameters of the *Lemon/Agostini* test, including Justice O'Connor's application of that test in *Mitchell v. Helms*. Adoption of the

⁶⁹ All federal programs involving financial assistance to nonprofit institutions require annual audits by a certified public accountant whenever the institution receives more than \$300,000 a year in total federal awards. Executive Office of the President of the United States, Office of Management and Budget, Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35289 to 35302 (June 30, 1997). The independent audit is not just over financial expenditures, but includes a review for program compliance.

⁷⁰ See notes 15 and 64, *supra*, for an example of a "Certification of Compliance" requirement drafted into the charitable choice provision.

⁷¹ A self-audit subpart for insertion into S. 304 at § 701(f), would read as follows: "An organization providing services under a program described in this section shall conduct annually a self audit for compliance with its duties under this section and submit a copy of the self audit to the appropriate Federal, State, or local government agency, along with a plan to timely correct variances, if any, identified in the self audit."

Department of Justice's recommendations in notes 15, 17, 64, and 71, above, will further clarify and strengthen § 701's provisions, as well as ease its scrutiny in the courts. Moreover, for many cooperating FBOs, those willing to properly structure their programs and be diligent with their operating practices, it appears that charitable choice can be applied in accord with the applicable statutory and constitutional parameters.

- end -

June 5, 2001